

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Statesboro Division

IN RE:	)	Chapter 13 Case
	)	Number <u>89-60238</u>
WILLIAM ERNEST EAST	)	
SS# 291-54-7813	)	FILED
409 West Mann Street	)	at 10 O'clock & 13 min A.M.
Glennville, Georgia 30427	)	Date: 3-19-90
	)	
Debtor	)	

**ORDER**

This Chapter 13 proceeding came before the court for confirmation. At the confirmation hearing debtor proposed a-modification in his plan to provide for monthly payments to the Chapter 13 trustee of Two Hundred Fifty and No/100 (\$250.00) Dollars for a period of sixty (60) months. Even with this increase in payments from the originally proposed One Hundred Two and No/100 (\$172.00) Dollars per month, the trustee projects a zero dividend to creditors holding unsecured claims. Barnett Bank, by far the largest creditor, holding a claim partially secured by one (1) 1988 Dodge 600 automobile objected to confirmation under 11 U.S.C. §1325(a)(3). Barnett Bank contends that this is not a good faith filing.

Inquiry by this court regarding the confirmation requirements of 11 U.S.C. §1325(a) reveals the following: The

debtor's current plan proposes that creditors holding secured claims

shall retain the lien securing their claims. Creditors who file claims and whose claims are allowed as secured claim shall be paid the lesser of 1) the amount of their claim, or 2) the value of their collateral as set forth in the proposed plan. As it pertains to Barnett Bank, the debtor valued the collateral, the automobile, at Ten Thousand and No/100 (\$10,000.00) Dollars resulting in the split claim. Subsequent to secured creditors, dividends to unsecured creditors who file claims and whose claims are allowed (including the unsecured balance of any partially secured debts) shall be paid zero percent (0%) or pro rata from remaining funds in an amount to be estimated at confirmation. In accordance with Bankruptcy Local Rule 8 incorporated within Local Rules of the United States District Court for the Southern District of Georgia, the Chapter 13 trustee proposes to pay interest at a rate of Twelve percent (12%) per annum on allowed secured claims. The trustee has split the allowed claim of Barnett Bank paying Ten Thousand and No/100 (\$10,000.00) Dollars as a secured claim plus future interest at the rate of Twelve Percent (12%) and the balance of Two Thousand Seven Hundred Eighty-Two and 56/100 (\$2,782.56) Dollars as an unsecured claim. Including the unsecured portion of the claim of Barnett Bank, unsecured claims total Six Thousand Nine Hundred

Forty-One and 38/100 (\$6,941.38) Dollars.

From a disposable monthly income of One Thousand Two Hundred Ninety-Three and 30/100 (\$1,293.30) Dollars the debtor proposes a budget for a family of four of One Thousand One Hundred Twenty and 69/100 (\$1,120.69) Dollars resulting in an excess of estimated future monthly income over estimated future expenses of One Hundred Seventy-Two and 61/100 (\$172.61) Dollars. Within the proposed living expense budget is a Two Hundred and No/100 (\$200.00) Dollar child support payment to the debtor's ex-wife for the support of two minor children residing with her. Under this budget, the debtor is now proposing to devote more than all remaining disposable income to the plan payments. However, the fact that the debtor is proposing to devote all disposable income to the plan for a period in excess of three years is not determinative of the question of good faith.

This is not the debtor's first bankruptcy proceeding. The debtor's schedules executed under oath state that the debtor filed a prior Chapter 13 proceeding in 1988, In re: William Ernest East, Chapter 13 Case No. 88-60345 (Bankr. S.D. Ga. 1988). Debtor's prior Chapter 13 proceeding was dismissed before confirmation based upon the failure of the debtor to make the called for payments of Three Hundred and No/100 (\$300.00) Dollars per month to the trustee under the proposed Chapter 13 plan.

This court has not only the right to inquire into the

question of good faith, but also the duty of making a case-by-case inquiry to determine whether a proposed Chapter 13 plan meets the statutory requirements for confirmation under 11 U.S.C. 1325(a) including "good faith". In re: Hale, 65 B.R. 893 (Bankr. S.D. Ga. 1986); In re: Steele, 34 B.R. 172 (Bankr. M.D. Ala. 1983).

Although a comprehensive definition of good faith is not practical, broadly speaking, the basic inquiry should be whether under the circumstances of the case there has been an abuse of the provisions, purpose and spirit of Chapter 13 in the proposed plan. Kitchens v. Georgia Railroad Bank & Trust Company, 702 F.2d 885 (11th Cir. 1983). The Kitchens decision basically sets forth the following nonexclusive list of factors that must be considered by this court in any good faith determination:

1. The amount of the debtor's income from all sources;
2. The living expenses of the debtor and his dependents;
3. The amount of attorneys fees;
4. The probable or expected duration of the debtor's Chapter 13 plan;
5. The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
6. The debtor's degree of effort;
7. The debtor's ability to earn and the likelihood of fluctuation in his earnings;
8. Special circumstances such as inordinate medical expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
10. The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack or same, in dealing with his creditors;
11. The burden which the plan's administration would place upon the trustee;
12. The substantiality of repayments; and
13. The potential nondischargeability of debt in a Chapter 7 proceeding.

The objecting creditor points to two of the Kitchens criteria which, according to Barnett Bank require denial of confirmation: The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its successor and the substantiality of repayment. Regarding the first referenced Kitchens criteria, the

debtor's previous Chapter 13 plan was dismissed prior to confirmation based upon the failure of the debtor to meet the payments under the proposed plan. At this confirmation hearing, the debtor testified that his inability to fund the previous plan was because he was in training for his present position as a corrections officer with the Georgia State prison system. The debtor testified that he has completed his training program and is now fully employed and capable of funding the plan. The Barnett Bank has called to this court's attention the terms of the order dismissing the previous Chapter 13 plan which state

The debtor has provided 'adequate protection' to each secured creditor by making preconfirmation payments to the Chapter 13 trustee. In re: Coplin, No. 386-00886 (B.C.S.D. Ga. 1987); 11 U.S.C. §361(a). Upon confirmation of the debtor's plan, these accumulated funds would have been distributed pro rata to secured creditors to compensate them for the delay they would have endured as a result of the automatic stay. Because this case is being dismissed prior to confirmation of plan, secured creditors will receive no payments on account of the plan; the 'adequate protection' provided by the debtor

in the form of payments to the trustee has proved to be inadequate.

When "adequate protection" proves to be inadequate, each affected secured creditor is entitled to alternative compensation in the form of an administrative expense claim 11 U.S.C. §507(b). They are entitled to pro rata satisfaction of those claims out the monies which the debtor has paid to the trustee. 11 U.S.C. §1326(a)(2).

In re: William Ernest East Chapter 13 Case No. 88-60346 (Bankr. S.D. Ga. filed July 6, 1989) (order dismissing case prior to

confirmation). Due to the failure of the debtor to make sufficient payments to the trustee, all funds held by the trustee were insufficient to satisfy court costs and attorneys fees ahead of disbursement to the secured creditors. Under the previous Chapter 13 case, Barnett Bank received nothing. Even though the order of dismissal of the first case failed to provide any money to Barnett Bank, to the satisfaction of this court the debtor has explained the failure of his previous Chapter 13 case.

The remaining issue raised by Barnett Bank is the substantiality of repayment. In this case, the debtor proposes to pay nothing to holders of unsecured claims.

Certainly an important factor that the court must weigh in their analysis is the percentage of payment to unsecured creditors which the plan proposes. A low percentage proposal should cause the court to look askance at the plan since repayment is one purpose of a Chapter 13 plan. However, the amount of the repayment to

unsecured creditors is only one of the many factors which the court must consider in determining whether the plan meets the statutory good faith requirement. Other factors or exceptional circumstances might exist which would preclude a finding of bad faith even though only a nominal repayment to unsecured creditors is proposed.

In re: Estus, 695 F.2d 311, 317 (8th Cir. 1982). See also In re: Kitchens, supra at 889. From the evidence presented, it is apparent that the debtor is devoting at least all disposable income to the plan for an extended period of sixty (60) months which still fails to generate a dividend for the holders of unsecured claims. However, the devotion of all disposable income to a plan is not a showing of exceptional circumstances which would mitigate against a finding of a bad faith filing in a zero dividend composition case. See, In re: Belgrade, 4 B.R. 421 (Bankr. W.D. N.Y. 1980). For the debtor to meet the "good faith" confirmation criteria of §1325(a)(3) where the debtor proposes a nominal or zero dividend composition plan, it is incumbent upon the debtor to establish exceptional circumstances to overcome the "substantiality of repayment" factor for confirmation under the Kitchens analysis. The debtor must establish more than the fact that he is devoting at least all disposable income to the plan for at least three years. In the instant case, this debtor simply does not have sufficient disposable income to meet the secured obligations he has incurred and still pay any dividend to the holders of unsecured claims. There are no exceptional

circumstances or factors present in this case to overcome a finding of bad faith where no repayment to unsecured creditors is proposed. In addition to the failure of the debtor to meet the good faith confirmation criteria of §1325(a)(3), the debtor has failed to establish that he will be able to make all payments under the plan and to comply with the plan as required under §1325(a)(6). In the present case, the debtor initially proposed an extremely frugal budget of future living expenses calling for the debtor and his dependents, a wife and two step-children to live on a monthly income of approximately One Thousand One Hundred Twenty and No/100 (\$1,120.00) Dollars. From this income the debtor also proposes to meet a Two Hundred and No/100 (\$200.00) Dollar per month child

support obligation to his previous spouse. Nine Hundred Twenty and No/100 (\$920.00) Dollars per month remains to support a family of four. This budget allows a monthly payment of One Hundred Seventy Two and No/100 (\$172.00) Dollars to the Chapter 13 trustee. In order to pay secured creditors the value of their collateral and priority claims, the trustee projects a minimum required monthly payment of Two Hundred Fifty and No/100 (\$250.00) Dollars. The debtor has proposed such a payment by modification. A Two Hundred Fifty and No/100 (\$250.00) Dollar payment will result in a reduction in net disposable income available for support of the debtor and his household to Eight Hundred Forty-Two and No/100 (\$842.00) Dollars per



month.

By far the most important criteria for the confirmation of a Chapter 13 plan in terms of promoting the success of Chapter 13 is the requirement that the court determine whether the Chapter 13 debtor will be able to make all payments under the plan and comply with all provisions of the plan.

5 Collier on Bankruptcy §1325.07 (L. King 15th ed. 1989).

When the Chapter 13 plan calls for payments to creditors, the feasibility test [section 1325(a)(6)] requires the debtor to demonstrate income sufficient to make the payments called for by the plan and sufficient to meet the living expenses of the debtor and the debtor's family without excessive hardship. H.R. Rep. No. 595, 95th Cong., 1st Sess. 124 (1977); 3 Norton Bankr. L. & Prac. §75.09 (W. Norton, 1989).

In this case, the debtor has failed to demonstrate income sufficient to make the payments called for by the plan and sufficient to meet

any reasonable level of living expenses for the debtor and his family.

This court is aware of the admonitions of at least one leading bankruptcy commentator.

Even when the court has serious doubts about feasibility these debtors should usually be given a chance to attempt their proposed plan, especially where they have substantially complied with their planned obligations prior to confirmation. In such cases, which often involve vital property such as a home or automobile, the court should be reluctant to impose its

idea of what sacrifices the debtor is able to make.

5 Collier on Bankruptcy ¶1325.08 (L. King 15th ed. 1989).

However, rather than imposing this court's idea of what sacrifices a debtor is capable of making, the feasibility requirement of §1325(a)(6) requires that this court make an independent determination based upon the evidence presented at confirmation and in the schedules submitted by the debtor of his ability to meet the plan obligations. This court's refusal to turn a blind eye to 'reality and approve a plan with no hope of success protects not only the creditors, such as Barnett Bank in this case whose collateral, an automobile, will in all likelihood continue to depreciate through time and use by the debtor, and the debtor by preventing him from embarking upon a plan doomed to failure from its inception; but also the integrity of the entire bankruptcy process.

Other than repayment, a principal purpose of Chapter 13 is financial rehabilitation. The debtor was driven to Chapter 13 by his failure to meet his prepetition debt obligations as they matured. Additional financial failure in a Chapter 13 plan could hardly provide any rehabilitative benefit. The confirmation of a plan in which the court has serious reservations as to the ability of the debtor to perform his plan obligations and providing for his family would ignore rehabilitation as a central purpose of Chapter 13. This debtor has failed to demonstrate that the plan as proposed is feasible. From the evidence submitted at confirmation hearing,

the schedules submitted by the debtor under oath with his current disposable income and the claims allowed in this case, this debtor cannot propose a confirmable plan under Chapter 13.

It is therefore ORDERED that confirmation of this Chapter 13 plan is denied. It is further ORDERED that pursuant to the provisions of 11 U.S.C. §105(a) this Chapter 13 proceeding is dismissed.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 19th day of March, 1990.